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Hiap-Taih Welding & Construction Sdn Bhd & Anor v Boustead Pelita Tinjar Sdn Bhd (formerly known as Loagan Bunut Plantations Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–1002 OF 2011
AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA
3 APRIL 2014

Civil Procedure — Parties — Misjoinder of party — Plaintiff joined defendant's solicitor as party in action to recover excess payment made to defendant — Whether solicitor wrongly joined for want of cause of action — Whether solicitor merely acted for and carried out instructions of defendant — Whether party could not be joined simply on basis of ex abundanti cautela — Whether factual matrix justified application of s 73 of the Contracts Act 1950 — Whether monies paid by plaintiff were not under mistake of fact

The High Court had ordered the first appellant ('HTWC') and its solicitor, the second appellant, to forthwith return to the respondent RM136,057.64 which was claimed to be a sum the respondent had overpaid when it settled an arbitration award favouring HTWC. The court had also granted the respondent a declaration that a sum of RM373,488.31 it had paid to HTWC through HTWC's former solicitor before the arbitration award was handed down, should be deemed as part payment of the arbitration award. Subsequent to the appellants' filing of their instant appeal against the High Court's decision, HTWC was wound up by order of court and the official receiver was appointed its liquidator. Although HTWC was directed during case management dates to obtain sanction of the liquidator or of the court to proceed with its instant appeal, it failed to do so. As a result, the Court of Appeal struck out HTWC's instant appeal. With regard to the second appellant, it was argued that the High Court erred in holding the law firm liable. The second appellant contended that it acted at all material times on the instructions of HTWC; that, accordingly, the respondent had no cause of action against the second appellant and that the High Court was wrong to hold that a party could be joined in an action *ex abundanti cautela*. The respondent argued that the second appellant was liable to return both the sum of RM373,488.31 and the alleged excess payment of RM136,057.64 under s 73 of the Contracts Act 1950 as those monies were received by the firm under mistake of fact.

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Held:

(1) There was no valid cause of action for the second appellant to have been made a party in the suit. There was no principle of law that a party could be joined on the basis of 'over-abundance of caution' (see para 20).

(2) It was irrefutable that the second appellant at all material times acted for and on behalf of and on the instructions of the first appellant. As a matter of general principle, a solicitor acting for a client in a civil case owed no duty of care to his client's adversary. In the performance of his duties, a solicitor's duty was only to his client. It was not the respondent's case that the second appellant had stepped outside the role of its duty as solicitor for the first appellant and had accepted a direct responsibility towards the respondent. It was also never pleaded, and nor was there any evidence, that the respondent had paid money to the second appellant as stakeholder to await an event (see paras 15, 16, 18 & 19).

(3) Section 73 of the Contracts Act 1950 had no application to the case. As acknowledged in the respondent's affidavit, the sum of RM373,488.31 was paid voluntarily based on the respondent's own assessment of what was owing to the first appellant and it was then treated as interim payment and accepted without prejudice. Furthermore, any payment to the second appellant, including the alleged excess payment of RM136,057.64, was made pursuant to a valid final arbitration award which was eventually registered in the High Court for enforcement. That being the case, there was no element of mistake in relation to the various payments that were made to the second appellant (see para 22).

[Bahasa Malaysia summary

Mahkamah Tinggi memerintahkan perayu pertama (Haip Taih Welding (HTWC))dan peguamnya, perayu kedua untuk serta-merta mengembalikan kepada responden RM136,057.64 yang dituntut menjadi jumlah yang responden terlebih bayar apabila ia menyelesaikan award timbang tara yang memihak HTWC. Mahkamah turut memberikan responden suatu deklarasi bahawa jumlah wang sebanyak RM373,488.31 yang telah dibayar kepada HTWC melalui peguam terdahulu HTWC sebelum award timbang tara diberikan, patut dianggap sebagai sebahagian pembayaran award timbang tara. Berikutan itu perayu memfailkan rayuan mereka terhadap keputusan Mahkamah Tinggi, HTWC telah digulungkan melalui perintah dari mahkamah dan penerima rasmi telah dilantik sebagai penyelesai. Walaupun HTWC telah diperintahkan sewaktu tarikh-tarikh pengurusan kes untuk memperoleh sanksi dari penyelesai atau dari mahkamah untuk meneruskan rayuannya, ia gagal berbuat demikian. Akibatnya, Mahkamah Rayuan membatalkan HTWC. Berkenaan perayu kedua, adalah dihujahkan bahawa Mahkamah Tinggi telah terkhilaf dalam memutuskan firma undang-undang itu bertanggungan. Perayu kedua menegaskan bahawa ia telah bertindak pada

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setiap masa material atas arahan HTWC; bahawa, sewajarnya, responden tidak mempunyai kausa tindakan terhadap perayu kedua dan Mahkamah Tinggi adalah salah untuk memutuskan bahawa suatu pihak boleh dibicarakan bersama dalam suatu tindakan *ex abundanti cautela*. Responden berhujah bahawa perayu kedua adalah bertanggungan untuk mengembalikan kedua-dua jumlah wang sebanyak RM373,488.31 dan bayaran lebihan yang didakwa sebanyak RM136,057.64 di bawah s 73 Akta Kontrak 1950 kerana wang tersebut diterima oleh firma itu di bawah kesilapan fakta.

Diputuskan:

(1) Tiada kausa tindakan yang sah atas perayu kedua untuk dijadikan sebagai pihak dalam guaman itu. Tiada prinsip undang-undang bahawa suatu pihak boleh dibicarakan bersama atas dasar 'over-abundance of caution' (lihat perenggan 20).

(2) Adalah tidah boleh disangkal bahawa perayu kedua pada masa material bertindak untuk dan atas arahan perayu pertama. Sebagai perkara prinsip am, seorang peguam bertindak untuk anak guamnya dalam kes sivil tidak mempunyai kewajipan berjaga-jaga kepada lawan anak guamnya. Adalah bukan kes responden bahawa perayu kedua telah bertindak di luar peranannya sebagai peguam untuk perayu pertama dan telah menerima tanggungjawab langsung kepada responden. Ia juga tidak pernah diplidkan, dan tiada apa-apa keterangan, bahawa responden telah membayar wang kepada perayu kedua sebagai pihak berkepentingan yang menantikan hasil (lihat perenggan 15, 16, 18 & 19).

(3) Seksyen 73 Akta Kontrak 1950 tidak terpakai kepada kes tersebut. Memandangkan penerimaan dalam afidavit responden, jumlah wang sebanyak RM373,488.31 telah dibayar secara sukarela berdasarkan penilaian responden sendiri atas apa yang terhutang kepada perayu pertama dan ia kemudiannya digunakan sebagai pembayaran interim dan diterima tanpa prejudis. Tambahan lagi, apa-apa pembayaran kepada perayu kedua, termasuk bayaran lebihan yang didakwa sebanyak RM136,057.64, telah dibuat mengikut kepada award muktamad timbang tara yang sah yang akhirnya didaftarkan di Mahkamah Tinggi untuk dikuat kuasakan. Lantaran itu, tiada elemen kesilapan berkaitan dengan pelbagai pembayaran yang telah dibuat kepada perayu kedua (lihat perenggan 22).]

Notes

For cases on misjoinder of parties, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6341–6345.

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Cases referred to

Al-Kandari v JR Brown & Co [1988] 1 All ER 833, CA (refd)
Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406, CA (folld)
Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd [2002] 6 MLJ 507; [2002] 7 CLJ 81, CA (refd)
Sorrell v Finch [1977] AC 728, HL (refd)
Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (refd)
Wong Cheong Kai & Ors v Hongkong Bank (M) Bhd & Anor [2000] 3 MLJ 419; [2000] 4 CLJ 421, HC (refd)

Legislation referred to

Companies Act 1965 s 233(2)
Contracts Acts 1950 s 73

Appeal from: Originating Summons No 24–347 of 2010–II (High Court, Kuching)

Richard Poh Sze Eng (Mohd Ivan bin Hussein and Jonathan Gregory Chong with him) (Poh & Co) for the second appellant.
Derbe Tang (Tang Legal Practice) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This is an appeal by Hiap-Taih Welding & Construction Sdn Bhd ('the first defendant in the High Court') and Poh & Co, the first defendant's solicitor ('the second defendant in the High Court') against the decision of the learned judicial commissioner ('JC') of the Kuching High Court on 28 February 2011 allowing Boustead Pelita Tinjar Sdn Bhd's ('the plaintiff in the High Court') originating summons for the following orders:

(a) a declaration that the sum of RM373,488.31 paid by the plaintiff to the first defendant and received by and through the second defendant in January 2002 is deemed partial payment of the principal sum awarded to the defendant amounting to RM1,144,555 by the arbitration award dated 23 May 2007 issued by Khoo Choong Keow;

(b) a declaration that the plaintiff overpaid RM136,057.63 to the first defendant and/or the second defendant when it purported to settle the principal award sum by paying the sum of RM1,207,437.66 being the balance principal award sum inclusive of interest up until 23 May 2009;

(c) the first defendant and/or second defendant forthwith return a sum of RM136,057.64 to the plaintiff; and

(d) costs of RM5,000 for the plaintiff.

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[2] Aggrieved by that decision, both the defendants appealed to this court. However, on 28 May 2012, the first defendant was wound up by a court order and the official receiver was appointed as the liquidator.

[3] When this appeal came up before us, it was brought to our attention that during the first case management on 29 November 2012, and in the four subsequent case managements, the first defendant was directed and reminded to obtain leave or sanction in order to proceed with this appeal from the official receiver or the court under s 233(2) of the Companies Act 1965. To-date, the first defendant has failed to obtain leave or sanction from the official receiver or the court. Applying the principle of law as laid down in the recent Court of Appeal case of *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406 and as the first defendant has failed to obtain the said sanction or leave, we had accordingly struck out the first defendant's appeal.

[4] We then proceeded to hear the second defendant's appeal and after hearing oral submissions, we reserved judgment. We now give our judgment. For convenience and ease of reference, we will refer to all parties in this judgment as in the manner they were referred to in the court below.

[5] To make the point under discussion easier to understand, we begin by stating briefly the factual background and the sequence of events leading to the present appeal.

[6] By an agreement dated 19 June 2000, the plaintiff had engaged the first defendant to undertake the construction of earthworks for their Palm Oil Mill. Following breaches of the terms of the agreement, the first defendant had vide a letter dated 17 October 2001 terminated the agreement. Subsequently, the then first defendant's solicitor, Messrs Kho & Poh (which was later taken over by the second defendant) presented their claim on quantum meruit for RM2,495.544.56 excluding other claims for damages to be assessed. The plaintiff's solicitor replied by a letter dated 24 January 2002 addressed to the then first defendant's solicitor stating that only RM373,488.31 was owing to the first defendant. A cheque for that amount was enclosed with the said letter. Shortly afterwards, the first defendant's then solicitor replied to this letter, and in that letter dated 31 January 2002, even though they disputed the assessment by the plaintiff of the amount due to them, they accepted the sum of RM373.488.31 as interim payment and strictly on the basis without prejudice to their claims against the plaintiff.

[7] From then on the dispute between the plaintiff and the first defendant was referred for arbitration. The arbitrator assessed the total amount of work done by the first defendant to be in the sum of RM1,144,555 under the

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arbitration award dated 23 May 2007. Subsequently, the plaintiff filed an application to set aside part of the said award in Kuala Lumpur High Court but it was dismissed. In the meantime, on 4 September 2008, the first defendant application to register the said arbitration award for purpose of enforcement in the High Court of Kuching was allowed.

[8] As events unfolded, on or about 26 February 2009, the first defendant demanded payment of the full principal sum of RM 1,144,555. On 25 May 2009, the plaintiff paid a sum of RM1,207,437.66 as the balance outstanding under the principal sum of RM1,144,555 after taking into account the interim payment of RM373,488.31 paid earlier in January 2002. The said payment of RM1,207,437.66 was paid through the second defendant as solicitor of the first defendant.

[9] At the same time, the plaintiff was deeply concerned that the amount of RM373.488.31 paid previously to the first defendant was not taken into account in the arbitration award. Hence, on 27 May 2009, the plaintiff wrote to the arbitrator seeking clarification as to whether he had accounted for the interim payment of RM373,488.31 in the said award. The arbitrator replied by his letter dated 1 June 2009 stating that he doubted whether he had jurisdiction on the sum of RM373,488.31.

[10] Thereafter on 10 June 2009, the second defendant on behalf of the first defendant disputed the plaintiff's position on the said RM373,488.31 and considered it as a 'dead issue'. On 29 July 2009, the second defendant on behalf of the first defendant demanded from the plaintiff the said outstanding sum of RM373.488.31 with interest failing which the first defendant would initiate legal proceedings.

[11] After that, the plaintiff asserted that there was an overpayment made to the second defendant as solicitor for the first defendant of RM136,057.63. According to the plaintiff, since the correct sum payable as at 23 May 2009 was RM1,071,380.03 and the plaintiff had paid RM1,207,437.66, there was an excess payment of RM136.057.63 to the first defendant and/or the second defendant.

[12] Continuing with the sequence of events, the plaintiff took out the originating summons dated 12 November 2010, which is the subject matter of the present appeal seeking, among others, a declaration in respect of the interim payment of RM373,488.31 and the recovery of the excess payment of RM136,057.63. In the originating summons the plaintiff sought the following orders:

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(a) a declaration that the sum of RM373.488.31 paid by the plaintiff to the first defendant and received by and through the second defendant in January 2002 is deemed partial payment of the principal sum awarded to the defendant amounting to RM1,144,555 by the arbitration award dated 23 May 2007 issued by Mr Khoo Choong Keow;

(b) a declaration that the plaintiff overpaid RM136,057.63 to the first defendant and/or the second defendant when it purported to settle the principal award sum by paying the sum of RM1,207,437.66 being the balance principal award sum inclusive of interest up until 23 May 2009;

(c) the first defendant and/or second defendant forthwith return a sum of RM136,057.64 to the plaintiff;

(d) An injunction restraining the first defendant and its agents or servants from claiming or purporting to execute the entire or any part or any interest relating to the sum of RM373.488.31 in any manner whatsoever until this suit has been decided upon by this court.

[13] As we have indicated earlier, the learned JC had on 28 February 2011 allowed in part the plaintiff's originating summons. So much about the factual background and the sequence of events leading to the present appeal.

[14] Before us, the principal ground raised by learned counsel for the second defendant in support of the second defendant's appeal is that the learned JC erred in law and in fact in holding that the law firm of Poh & Co can be included as the second defendant in this matter. Learned counsel argued that there is no cause of action against the law firm which at all material times was only acting as legal representatives of the first defendant. In this regard, learned counsel argued that the learned JC misdirected herself when she held that a party can be joined to an action premised on 'an over abundance of caution'.

[15] On the facts of the present case, we find there is much merit in the arguments of learned counsel for the second defendant. From what we have earlier outlined and as can be seen on the originating summons and plaintiff's affidavit in support at pp 22–38 of the appeal record, the second defendant was sued in its capacity as solicitor of the first defendant. It is irrefutable that the law firm of the second defendant was at all material times acting for and on behalf of and on the instructions of the first defendant.

[16] As a matter of general principle, a solicitor acting for a client in a civil case owes no duty of care to his client's adversary and in the performance of his duties, a solicitor's duty is only to his client, with proper care and attention. Bingham LJ in *Al-Kandari v JR Brown & Co* [1988] 1 All ER 833 said:

> In the ordinary course of adversarial litigation a solicitor does not owe a duty of care

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to his client's adversary. The theory underlying such litigation is that justice is best done if each party, separately and independently advised, attempts within the limits of the law and propriety and good practice to achieve the best result for himself that he reasonably can without regard to the interests of the other party. The duty of the solicitor, within the same limits, is to assist his client in that endeavor, although the wise solicitor may often advise that the best result will involve an element of compromise or give and take or horse trading. Ordinarily, however, in a contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent.

[17] The authority of *Al-Kandari v JR Brown & Co* established the general principle that if a solicitor acting for his client steps outside the role of its duty as solicitor for his client and accepts a direct responsibility towards a third party, then the solicitor has created an independent duty of care to the third party and shall be personally liable to the third party when he breached such duty of care (see: *Wong Cheong Kai & Ors v Hongkong Bank (M) Bhd & Anor* [2000] 3 MLJ 419; [2000] 4 CLJ 421 and *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507; [2002] 7 CLJ 81).

[18] Coming back to the present case, it was not however the plaintiff's case that the second defendant, as solicitor for the first defendant, had stepped outside the role of its duty as solicitor for its client and therefore accepted a direct responsibility towards the plaintiff.

[19] The other important point to note is that it was never pleaded, and nor was there any evidence that the plaintiff paid money to the second defendant to be held as stakeholder to await an event. Our then Supreme Court in *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116 agreed with the principle of law as laid down in the case of *Sorrell v Finch* [1977] AC 728 where the House of Lords held that if the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it and that he cannot sue the vendor because the vendor had never received it or become entitled to receive it.

[20] All this highlights the fact that in the present case there is no valid cause of action for the second defendant to be made a proper party in this matter. With respect, there is no principle of law that a party can be joined on the basis of 'over abundance of caution'. The significant point here is that even though judgment had been entered against the first defendant, and as indicated earlier, its appeal had been struck out, there is no cause of action against the second defendant who was merely acting as solicitor for the first defendant.

[21] We will now consider whether, as argued by learned counsel for the plaintiff, the second defendant is liable to return the sum of RM373,488.31

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and the alleged excess payment of RM136,057.63 to the plaintiff by virtue of s 73 of the Contracts Acts 1950 ('CA') which provides:

> 73 Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.
>
> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

[22] We noted that this issue was never raised by the plaintiff in the originating summons or the affidavit in support. Even so, it is now the submission of learned counsel for the plaintiff that since the money was paid to the second defendant under a mistake of fact, the plaintiff is entitled to recover it from the second defendant. We do not agree with this submission. As acknowledged in paras 7, 7.1 and 8 of the plaintiff's affidavit in support, the initial payment of RM373,488.31 was paid voluntarily by the plaintiff based on their own assessment and it was then treated as interim payment and accepted without prejudice. Furthermore, any payment to the second defendant, including the alleged excess payment of RM136,057.63 was made pursuant to a valid final arbitration award, which was eventually registered in Kuching High Court for enforcement. That being the case, there is no element of mistake in relation to the various payments made to the second defendant. In our view, the provisions of s 73 of the CA have no application in the present case.

[23] It is for all these reasons that we allow the second defendant's appeal with costs here and below, to be taxed unless agreed. We order the deposit to be refunded to the second defendant. We accordingly set aside the order of the learned JC in so far as it affects the second defendant.

Order accordingly.

Reported by Ashok Kumar